

2003

## A Cry for Compassion: Fear of AIDS in Pennsylvania

Andrew M. Satriano

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Andrew M. Satriano, *A Cry for Compassion: Fear of AIDS in Pennsylvania*, 41 Duq. L. Rev. 565 (2003).  
Available at: <https://dsc.duq.edu/dlr/vol41/iss3/7>

This Comment is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

# A Cry for Compassion: Fear of AIDS in Pennsylvania

## INTRODUCTION

Today, nearly a million people are living in the United States with the human immunodeficiency virus ("HIV") and acquired immunodeficiency syndrome ("AIDS").<sup>1</sup> Roughly 27,000 of those living with HIV/AIDS are located in Pennsylvania.<sup>2</sup> Since the first reported case of AIDS in 1981,<sup>3</sup> nearly a half million people have succumbed to the disease.<sup>4</sup> Though the number of cases of infection and AIDS-related deaths increased throughout the first decade of the disease, both the number of new cases and deaths have declined since that time.<sup>5</sup> However, there has been a recent resurgence of the HIV epidemic among homosexual men.<sup>6</sup>

---

1. Center for Disease Control and Prevention, *Division for HIV/AIDS Prevention: Basic Statistics*, at <http://www.cdc.gov/hiv/stats.htm> (last visited May 13, 2003). The cumulative number of AIDS cases reported to the CDC as of December 2001 was 816,149, of which 666,026 were male, 141,048 female, and 9,079 were children under 13 years of age. *Id.*

2. *Id.* Pennsylvania is ranked sixth among the states for the number of cumulative AIDS cases with 26,369 cases reported as of December 2001. *Id.* Of those, nearly 78% are residents of the Philadelphia area. *Id.*

3. Debbie E. Lanin, *The Fear of Disease as a Compensable Injury: An analysis of Claims Based on AIDS Phobia*, 67 ST. JOHN'S L. REV. 77, 89 (1993). See also Center for Disease Control and Prevention, *The HIV/AIDS Epidemic: The First 10 Years*, 40 MORBIDITY & MORTALITY WKLY. REP. 357 (1991). The first cases of AIDS were reported by health-care providers in California and the Centers for Disease Control. *Id.* By the end of 1981, there were 189 cases reported from 15 states and the District of Columbia. Center for Disease Control and Prevention, *Current Trends Update: Acquired Immunodeficiency Syndrome - United States, 1981 - 1990*, 40 MORBIDITY & MORTALITY WKLY. REP. 358 (1991). It is estimated that there are approximately 42 million people worldwide living with HIV/AIDS. See *CDC Basic Statistics*, *supra* note 1.

4. Center for Disease Control and Prevention, *Revised Guidelines for HIV Counseling, Testing, and Referral and Revised Recommendations for HIV Screening of Pregnant Women*, 50 (No. RR-19) MORBIDITY & MORTALITY WKLY. REP. 4 (2001). As of December 2001, there have been 467,910 cumulative AIDS related deaths reported to the CDC, a fraction of the estimated 3.1 million AIDS-related deaths occurring during 2002 worldwide. See *CDC Basic Statistics*, *supra* note 1.

5. Center for Disease Control and Prevention, *HIV and AIDS: United States, 1981 - 2000*, 50 MORBIDITY & MORTALITY WKLY. REP. 430 (2001). The number of persons living with AIDS is the highest ever reported in the United States. *Id.* The increase in survival rates is attributed to both advances in HIV prevention and treatments. Center for Disease Control and Prevention, *CDC HIV/AIDS Update: A Glance at the HIV Epidemic*, at <http://www.cdc.gov/nchstp/od/news/At-a-Glance.pdf> (last visited June 11, 2002).

6. Center for Disease Control and Prevention, *HIV Incidence Among Young Men Who Have Sex With Men - Seven U.S. Cities, 1994 - 2000*, 50 MORBIDITY & MORTALITY WKLY.

AIDS is a disorder of the immune system caused by infection with HIV.<sup>7</sup> There is generally a latency period where the virus may lay dormant in the body for years without symptoms of illness.<sup>8</sup> HIV destroys CD4 +T cells, referred to as helper cells, which are crucial to the normal functioning of the human immune system.<sup>9</sup> A strong correlation between the amount of HIV in one's blood stream and the reduction of helper cells is recognized as an indicator of the onset of AIDS.<sup>10</sup> HIV is primarily transmitted through sexual contact with an infected person, by sharing needles and syringes with an infected person, or through infected pregnant and/or nursing mothers.<sup>11</sup>

Due to the vast amounts of publicity the virus has received, many people fear for their lives when there is a possibility that they have been exposed to the virus. While many courts recognize concern over being infected with HIV as a legitimate fear and allow claims for negligent infliction of emotional distress ("NIED") to go forward, other courts require the potentially infected person to perform due diligence. Due diligence generally requires the plaintiff to consult relevant medical information to become familiar with the realities of the disease in order to ensure that the fear is objectively rational.<sup>12</sup> For a fear to be considered objectively rational, one may have to show actual exposure to the virus, prove a recognized channel of transmission, and provide evidence that there is a statistical likelihood that he/she may become infected through their exposure to the virus.

This comment is organized into several different parts. First, it addresses the three legal theories of recovery for fear of AIDS claims. Next, it discusses Pennsylvania's acknowledgement of a fear of AIDS claim and the refusal of Pennsylvania courts to grant

---

REP. 440 (2001). Of the cases reported, male-to-male sex is considered the most common mode of exposure. See *HIV and AIDS: United States, 1981 - 2000*, *supra* note 5, at 430.

7. Center for Disease Control and Prevention, *Division for HIV/AIDS Prevention: Questions and Answers: HIV is the Cause of AIDS*, at <http://www.cdc.gov/hiv/pubs/cause.htm> (last visited June 11, 2002).

8. *Faya v. Almaraz*, 620 A.2d 327, 329 (Md. 1993). The latency period may be ten years or longer, where the infected person is able to function normally. *Id.*

9. See *CDC Questions and Answers*, *supra* note 7.

10. *Id.*

11. *Id.* The known bodily fluids which have been proven as a mode of transmission for the virus include blood, semen, vaginal fluid, breast milk, and other bodily fluids containing blood. *Id.* It's also been recognized that the following fluids may transmit the virus: fluid surrounding the brain and spinal cord, fluid surrounding bone joints, and fluid surrounding an unborn baby. *Id.*

12. *Marchica v. Long Island R.R.*, 31 F.3d 1197, 1201 (2d Cir. 1994), *cert. denied*, 513 U.S. 1079 (1995).

recovery under theories derived from asbestos litigation. Third, it analyzes the deconstruction of the impact rule, upon which the fear of AIDS claims were decided, and the exceptions which would grant recovery under the zone of danger and bystander recovery theories. Following the deconstruction of the impact rule, the debate on whether Pennsylvania recognizes a fear of AIDS claim, brought under a negligent infliction of emotional distress theory, concludes with Pennsylvania granting recovery with their adoption of the actual exposure rule. Lastly, an attempt will be made to persuade the Pennsylvania courts to modify their current criteria for fear of AIDS recovery to an approach that is more in line with today's medical knowledge of the disease.

### I. THE THREE THEORIES OF RECOVERY FOR FEAR OF AIDS

When bringing a claim based on infliction of emotional distress related to a fear of contracting AIDS, the courts have recognized three prevalent theories for recovery. The first theory, recognized by a majority of the jurisdictions, necessitates that one has actually been exposed to the virus in order to bring suit.<sup>13</sup> This is known as the "actual exposure" rule,<sup>14</sup> and absent proof of actual exposure, one's fear of contracting AIDS is considered unreasonable.<sup>15</sup>

The adoption of the "actual exposure" rule by the majority of jurisdictions reflects several public policy concerns.<sup>16</sup> First, it ensures that the fear is not premised on misconceptions about AIDS, but rather based on a genuine concern.<sup>17</sup> Next, it "ensures stability, consistency and predictability in the disposition" of emotional distress cases.<sup>18</sup> It also ensures that those actually exposed to HIV are compensated for their emotional distress.<sup>19</sup> Lastly it protects the judicial system from frivolous lawsuits.<sup>20</sup>

The second theory, considered a more liberal approach, allows recovery where the plaintiff's fear of contracting AIDS is reason-

---

13. *Pendergist v. Pengergrass*, 961 S.W.2d 919, 924 (Mo. Ct. App. 1998).

14. *Pendergist*, 961 S.W.2d at 924.

15. *Id.*

16. *Id.* at 926.

17. *Id.* (citing *Brown v. New York Health and Hosp. Corp.*, 648 N.Y.S.2d 880 (N.Y. App. Div. 1996)).

18. *Id.* (citing *K.A.C. v. Benson*, 527 N.W.2d 553, 559 (Minn. 1995)).

19. *Pendergist*, 961 S.W.2d at 926 (citing *Kerins v. Hartley*, 33 Cal. Rptr. 2d 172, 179 (Cal. Ct. App. 1994)).

20. *Id.* (citing *Brown*, 648 N.Y.S.2d at 886).

able.<sup>21</sup> Presenting proof of possible exposure, rather than actual exposure to HIV, is sufficient to show that one's fear of contracting AIDS is reasonable.<sup>22</sup> Recovery is generally limited to the period of time between the event where exposure is alleged to have occurred and the time the plaintiff knew, or had reason to know, that he/she did not test positive for the disease.<sup>23</sup> Courts adhering to the reasonable fear approach generally limit recovery to six months since there is a 95% certainty that one will test positive after six months from the initial exposure.<sup>24</sup> The Center for Disease Control ("CDC") has recently concluded that HIV testing is now at least 95% accurate in a three-month period from the initial exposure, which theoretically would shorten the recovery period even further.<sup>25</sup>

The reasonable fear approach is largely based on the "massive informational campaign waged by the Federal, State, and local health officials ... to educate the public."<sup>26</sup> The justification is that a reasonable person who has been exposed to this information may develop a fear of AIDS when there is a recognized channel of transmission for the disease, such as being stuck by a needle.<sup>27</sup> Generally, when an individual has been potentially exposed to the virus, he/she is informed to live their life as if they are living with AIDS as a precautionary measure.<sup>28</sup> Being told to live one's life as if he/she is living with AIDS only enforces the rationale behind the reasonable fear approach.

The third theory, recognized only by California courts, is referred to as the "more likely than not" standard.<sup>29</sup> Here, actual exposure is a prerequisite; however, the plaintiff bears a heightened burden of proving that their fear stems from knowledge, corroborated by reliable medical or scientific opinion, that it is more

---

21. *Id.* at 925.

22. *Id.*

23. *Id.* (citing *Marchica*, 31 F.3d at 1207 (holding that once there is proof to a medical certainty that one has not been exposed to nor will develop the disease, any continuing fear is unreasonable); *Faya*, 620 A.2d at 337 (holding that continued fear of contracting AIDS may be unreasonable after testing negative over a year after exposure)).

24. *Faya*, 620 A.2d at 337; see *infra* note 38.

25. Center for Disease Control and Prevention, *Sexually Transmitted Diseases Treatment Guidelines 2002*, 51 (No. RR-6) MORBIDITY & MORTALITY WKLY. REP. 8 (2002).

26. *Castro v. New York Life Ins. Co.*, 153 Misc. 2d 1, 6 (N.Y. Sup. Ct. 1991).

27. *Castro*, 153 Misc. 2d at 6.

28. See *Marchica*, 31 F.3d at 1201 (plaintiff was advised by a physician to abstain from sexual relations with his wife); See also *Brown*, 648 N.Y.S.2d at 882 (hospital advised plaintiff to assume that she was HIV positive, to take AZT tablets, to use condoms when having sex, and to avoid kissing family members and sharing utensils).

29. *Kerins*, 33 Cal. Rptr. 2d at 178.

likely than not that one will become HIV positive and develop AIDS as a result of exposure.<sup>30</sup> With the reliability of testing today, it would be nearly impossible to recover under such a high standard of probability unless one has tested positive.

The "more likely than not" standard recognizes that everyone is aware of, and worried about, the possibility of developing this disease from exposure to HIV.<sup>31</sup> The second concern raised in defense of this heightened standard was the "unduly detrimental impact that unrestricted fear of liability would have in the health care field."<sup>32</sup> The next policy concern was the potential detriment to those who were exposed and ultimately develop the disease, if all persons fearing disease were afforded unrestricted redress.<sup>33</sup> Lastly, the court found the heightened standard necessary to promote early resolution of fear of AIDS claims by establishing a "sufficiently definite and predictable threshold for recovery to permit consistent application from case to case."<sup>34</sup>

## II. PENNSYLVANIA ACKNOWLEDGES A "FEAR OF AIDS" CLAIM BUT REFUSES RECOVERY

In 1993, the Pennsylvania Superior Court first recognized a "fear of AIDS" claim when it decided *Lubowitz v. Albert Einstein Medical Center*.<sup>35</sup> During the testing of donated placental blood, which was used in the in vitro fertilization procedure, the plaintiff was informed that the blood had tested positive for the AIDS antibody, HTLV-III.<sup>36</sup> HTLV-III has been recognized as the cause of

---

30. *Id.* at 179.

31. *Id.* at 178 (citing *Potter v. Firestone Tire & Rubber Co.* 863 P.2d 795, 812 (Cal. 1993)).

32. *Id.* (quoting *Potter*, 863 P.2d at 812).

33. *Id.* (citing *Potter*, 863 P.2d at 813).

34. *Kerins*, 33 Cal. Rptr. 2d at 178 (quoting *Potter*, 863 P.2d at 813).

35. 623 A.2d 3, 5 (Pa. Super. Ct. 1993) (noting that whether a fear of AIDS claim is a compensable injury was an issue of first impression in the Commonwealth).

36. *Lubowitz*, 623 A.2d at 4. The hospital performed an enzyme-linked immunosorbent assay ("ELISA") test, which screens for the antibodies sensitive to HTLV-III, on the donated placental blood. *Id.* This test standing alone is 98.6% effective in detecting exposure to AIDS. *Kozup v. Georgetown University*, 663 F.Supp. 1048, 1053 (D.D.C. 1987) *aff'd in part, vacated on other grounds*, 851 F.2d 437 (D.C. Cir. 1988) (citing David A. Roling, Comment, *Transfusion-Associated Acquired Immune Deficiency Syndrome (AIDS): Blood Bank Liability?*, 16 U. BALT. L. REV. 81, 86 & n.36. (1986)).

AIDS.<sup>37</sup> Both the donor and the plaintiff tested negative for the AIDS antibody when tested six months later, as did their child.<sup>38</sup>

The Medical Center contended that the original test resulted in a "false positive" and that the plaintiff was never actually exposed to the AIDS virus.<sup>39</sup> According to the plaintiff, she experienced both mental distress and physical ailments as a result of the first positive results.<sup>40</sup> Deciding the case under the law surrounding asbestos claims,<sup>41</sup> the court held that one could only be compensated for a disease which existed at the time of trial, and since she was never exposed to the AIDS virus, she could not be compen-

---

37. *Kozup*, 663 F. Supp. at 1052 (citing Peter J. Fischinger, *Acquired Immune Deficiency Syndrome: The Causative Agent and the Evolving Perspective*, 9 CURRENT PROBLEMS IN CANCER 4 (1985); Thomas C. Quinn, *Editorial, Perspectives on the Future of AIDS*, 253 J. AM.MED.A. 247 (1985)). While the courts continue to acknowledge HTLV-III as the cause of AIDS, the medical profession considers the usage of HTLV passe. According to Dr. James Satriano, Director of HIV/AIDS Programs, New York State Office of Mental Health, Robert Gallo, while working at the Institute of Allergy and Infections Diseases in the United States was briefly heralded as a co-discoverer of the AIDS virus along with Luc Montagnier, from the Pasteur Institute in France. It was Luc Montagnier who first announced the discovery of the virus, which he labeled LAV, lymphadenotropic associated virus, while Robert Gallo, shortly thereafter, announced the discovery of a virus which he called HTLV-III, human t-cell lymphotropic virus. It was subsequently determined that Gallo's virus was cultured from a sample which Montagnier had sent to him, resulting in a patent infringement suit, and the renaming of the virus to HIV. E-mail from James Satriano, Ph.D., Director of HIV/AIDS Programs, New York State Office of Mental Health; Research Scientist, New York State Psychiatric Institute (July 18, 2002) (on file with author).

38. *Lubowitz*, 623 A.2d at 4. Both samples were subject to an ELISA test and a Western Blot analysis. *Id.* When the two tests are used in conjunction the detection rate increases to 99.9%. *Faya*, 620 A.2d at 332 n.4 (citing U.S. Department of Health and Human Services, *Voluntary HIV Counseling and Testing: Facts, Issues, and Answers* (1991); *Kozup*, 663 F.Supp. at 1052-53). See also *Doyle v. Home Office Reference Laboratory*, No. CIV.A.89-243 ERIE, 1990 U.S. Dist. LEXIS 5850, \*7 (W.D. Pa. 1990) (citing Donald S. Burke, et. al, *Measurement of the False Positive Rate in a Screening Program for Human Immunodeficiency Virus Infections*, 319 NEW ENG. J. MED. 961 (1988)). The ELISA-Western Blot testing is recognized by the Center for Disease Control, the American Red Cross, and the Walter Reed Army Institute of Research as the standard in determining HIV infection. *Doyle*, 1990 U.S. Dist. LEXIS 5850, at \*6-7. While the ELISA test is a screening test, the Western Blot is a confirmatory test. *K.A.C. v. Benson*, 527 N.W.2d 553, 557 n.5 (Minn. 1995).

39. *Lubowitz*, 623 A.2d at 4. A "false positive" is a positive test result for a person who is not actually infected. Center for Disease Control and Prevention, *Revised Guidelines for HIV Counseling, Testing, and Referral and Revised Recommendations for HIV Screening of Pregnant Women*, *supra* note 4, at 54.

40. *Lubowitz*, 623 A.2d at 4.

41. *Id.* The court makes reference to cases which involve "risk of contracting disease" claims. *Id.* at 5 (citing *Ottavio v. Fiberboard Corp.* 617 A.2d 1296 (Pa. Super. Ct. 1992); *Altieri v. Fibreboard Corp.*, 617 A.2d 1302 (Pa. Super. Ct. 1992); *Marinari v. Asbestos Corp.* 612 A.2d 1021 (Pa. Super. Ct. 1992)).

sated based on her fear of developing AIDS.<sup>42</sup> Adopting an actual exposure rule, the court's decision mandated that one could not bring a fear of AIDS claim unless one has actually tested positive. This followed the United States District Court for the Eastern District of Pennsylvania's ruling in *Burk v. Sage Products, Inc.*<sup>43</sup> decided three years prior to the *Lubowitz* decision.

In *Burk*, a paramedic brought suit against the manufacturer and distributor of a container designed for the disposal and containment of used medical syringes.<sup>44</sup> The paramedic alleged that he was pricked by a needle protruding from the container, and had developed various ailments stemming from his fear of contracting AIDS.<sup>45</sup> No proof was presented that the needles were actually used on an AIDS patient, although it was alleged that there were several AIDS patients on the hospital floor, where the container was located.<sup>46</sup> Despite being tested for HIV antibodies on five separate occasions, the paramedic never tested positive.<sup>47</sup>

The district court, acknowledging that the Pennsylvania courts had recognized a cause of action for emotional fear for contracting a disease, found that the paramedic failed to establish actual exposure to the virus, and, since he had never tested positive, his case was without merit.<sup>48</sup> The paramedic claimed that although he had tested negative, there was a medical uncertainty whether he would develop the virus in the future.<sup>49</sup> Putting such uncertainty to rest, the district court reasoned that it was a medically accepted fact that, although one showed no signs of being infected with HIV, a person would still test positive for the HIV antibody during this period, and it was extremely unlikely that a person

---

42. *Lubowitz*, 623 A.2d at 5. The Court however noted that should the plaintiff contract AIDS as a result of the in vitro fertilization procedure she would then have a cause of action. *Id.* at n.3.

43. 747 F.Supp. 285 (E.D. Pa. 1990) *Burk* is recognized as the first medical case confronting the exposure or transmission of HIV in a "fear of AIDS" context. Robert C. Bollinger, *Commentary, On the Road to Recovery for Emotional Harm: Is the Fear of AIDS a Legally Compensable Injury?*, 16 J. LEGAL MED. 417, 427 (1995).

44. *Burk*, 285 F.Supp. at 286.

45. *Id.* at 286.

46. *Id.*

47. *Id.*

48. *Id.* at 286-87 (noting that not a single jurisdiction has permitted recovery for emotional distress for fear of contracting disease when exposure to an agent which has the potential to cause the disease has not been proven).

49. *Burk*, 285 F.Supp. at 288.



testing negative after six months from the initial exposure would contract the disease from that exposure.<sup>50</sup>

### III. THE DECONSTRUCTION OF THE IMPACT RULE

According to *Burk*, there cannot be recovery related to a fear of disease absent physical injury where the injury fails to arise from the exposure to the disease.<sup>51</sup> This follows what had been considered a well-established rule in Pennsylvania, that there could be no recovery for mental or emotional distress, unless accompanied by physical injury or impact.<sup>52</sup> The "impact rule," as it became known,<sup>53</sup> was first announced by the English courts in 1888.<sup>54</sup> Justice Musmanno in opposition to such a hard and fast rule, continually asked the Pennsylvania courts to take the lead and adopt the rule declared by the Restatement Second of Torts.<sup>55</sup> In support of adopting section 436(2) of the Restatement, Justice Musmanno relied on its nearly-unified support in legal texts and in a majority of the states.<sup>56</sup> It was not until the Pennsylvania Superior Court

50. *Id.* at 288 (citing Center for Disease Control and Prevention, *Interpretation and Use of the Western Blot Assay for Serodiagnosis of Human Immunodeficiency Virus Type 1 Infections*, 38 (No. S-7) MORBIDITY & MORTALITY WKLY. REP. 6 (1989). Ninety-five percent of those infected with HIV will test positive within six months of exposure to the virus. *Pendergast*, 961 S.W.2d at 922 (citing *Brown*, 648 N.Y.S.2d 880).

51. *Griffin v. American Red Cross*, No. CIV.A.93-5924, 1994 WL 675105, at \*2 (E.D. Pa. 1994) (citing *Burk*, 747 F.Supp. at 287; *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 274 (3d Cir. 1985), *appealed after remand*, 812 F.2d 81 (3d Cir. 1987)).

52. See *Potere v. City of Philadelphia*, 112 A.2d 100, 104 (Pa. 1955), *overruled by Niederman v. Brodsky*, 261 A.2d 84 (Pa. 1970).

53. *Knaub v. Gotwalt*, 220 A.2d 646, 648 (Pa 1966) (Musmanno, J. dissenting), *overruled by Niederman*, 261 A.2d 84.

54. *Niederman*, 261 A.2d at 86 n.2 (citing *Victorian Railways Commissioners v. Coultas*, 13 App. & Cas. 222 (1888)). The rule was abandoned in England thirteen years later. *Id.* (citing *Dulieu v. White & Sons*, 2 K.B. 699 (1901)).

55. *Potere*, 112 A.2d at 104 (Musmanno, J., concurring) (noting that a person could suffer severe traumatic emotional shock without physical impact or injury); *Bosley v. Andrews*, 142 A.2d 263, 280 (Pa. 1958) (Musmanno, J., dissenting), *overruled by Niederman*, 261 A.2d 84 (noting that the majority's decision was "insupportable in law, logic, and elementary justice" and would "continue to dissent from it until the cows come home."); *Knaub*, 220 A.2d at 649 (Musmanno, J., dissenting) (noting that "[t]he rule that there must be the mechanical requirement of impact, before recovery will be permitted, charges with lowered head against the stone wall of the most elementary phenomena observable practically every day.").

56. *Bosley*, 142 A.2d at 278 (Musmanno, J., dissenting) Section 436(2) states: [i]f the actor's conduct is negligent as creating an unreasonable risk of causing bodily harm to another otherwise than by subjecting him to fright, shock, or other similar and immediate emotional disturbances, the fact that such harm results solely from the internal operation of fright or other emotional disturbance does not protect the actor from liability.

RESTATEMENT (SECOND) OF TORTS § 436(2) (1965).

decided *Niederman v. Brosky*<sup>57</sup> in 1970 that the court created an exception to the impact rule.<sup>58</sup>

Mr. Niederman had been walking with his son when a vehicle, driven in a "reckless and negligent manner," skidded onto the sidewalk and hit a fire hydrant within feet of Mr. Niederman. Since Mr. Niederman was not struck by the vehicle, the physical impact necessary for recovery of emotional distress under the impact rule was lacking.<sup>59</sup> Abandoning the impact rule, the Supreme Court of Pennsylvania adopted what has become known as the "zone of danger" theory.<sup>60</sup> The "zone of danger" exception allows recovery for emotional distress in the absence of physical impact where the plaintiff was in personal danger of physical impact and actually feared the physical impact.<sup>61</sup>

Despite broadening the recovery for emotional distress with the *Niederman* decision, less than a decade later the Pennsylvania Supreme Court found that the "zone of danger" exception was just as unnecessarily restrictive.<sup>62</sup> *Sinn v. Burd*<sup>63</sup> is recognized as another exception to the "impact rule."<sup>64</sup> Here, the mother of two small children witnessed a vehicle strike and kill her daughter outside of their family's home.<sup>65</sup> The mother witnessed the accident through the front door of their home<sup>66</sup> and was determined not to be within the "zone of danger."<sup>67</sup> The court, adopting what is known as "bystander recovery," recognized what has been considered a three-part test.<sup>68</sup> *Sinn* requires that the person seeking redress be a close family member, whose location was near the scene of the accident, and where the emotional distress is a direct result of observing the accident.<sup>69</sup>

---

57. 261 A.2d 84.

58. *Id.* at 85 (announcing that "[t]oday the cows come home" paying homage to Justice Musmanno's dissent in *Bosley* (see *supra* note 55)).

59. *Id.* at 84-85 (noting that the impact rule provides that there can be no recovery for the consequences of emotional distress absent a contemporaneous impact).

60. *Sinn v. Burd*, 404 A.2d 672, 676 (Pa. 1979).

61. *Niederman*, 261 A.2d at 90.

62. *Sinn*, 404 A.2d at 677.

63. 404 A.2d 672.

64. *Stoddard v. Davidson*, 513 A.2d 419, 421 (Pa. Super. Ct. 1986).

65. *Sinn*, 404 A.2d at 674.

66. *Id.* at 674.

67. *Id.* at 686.

68. *Id.* See also *Stoddard*, 513 A.2d at 422.

69. *Id.* at 421. See also *Neff v. Lasso*, 555 A.2d 1304, 1308 (Pa. Super. Ct. 1989), *appeal denied*, 565 A.2d 445 (Pa. 1989).

#### IV. THE STALEMATE OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN AIDS CASES

Six months prior to the *Burk* decision, the United States District Court for the Western District of Pennsylvania was faced with the question of whether one could recover under the negligent infliction of emotional distress theory where physical impact was lacking.<sup>70</sup> Arguing that *Sinn* made such a recovery permissible,<sup>71</sup> the plaintiff attempted to bring suit because he allegedly suffered emotional distress when he was misinformed that he had tested positive for HIV.<sup>72</sup>

The plaintiff had recently undergone blood work as a prerequisite to applying for a life insurance policy.<sup>73</sup> Upon the initial testing he was informed, in writing, that he had tested reactive for HTLV-III, indicating exposure to HIV.<sup>74</sup> The plaintiff had a second blood test taken by an independent physician which indicated that he was HIV negative.<sup>75</sup> The district court, finding no basis of recovery based on the *Sinn* decision, held that the plaintiff must assert a physical impact to recover under a theory of NIED.<sup>76</sup>

Four years later, in *Griffin v. American Red Cross*,<sup>77</sup> the Eastern District Court of Pennsylvania reiterated that there could be no recovery without an accompanying physical injury arising from actual exposure to the disease.<sup>78</sup> Ms. Griffin had donated blood to the American Red Cross to be used in an upcoming surgery that she had scheduled.<sup>79</sup> Ms. Griffin had been advised by her physician to donate her blood in order to avoid the possibility of a transfusion-related illness.<sup>80</sup> A few weeks later, her physician informed her that she had tested HIV positive.<sup>81</sup> A second test was then

---

70. *Doyle*, 1990 U.S. Dist. LEXIS 5850, at \*3.

71. *Id.*

72. *Id.* at \*2.

73. *Id.* at \*1.

74. *Id.* at \*1-2. Upon reviewing his results, the plaintiff called the testing facility to confirm that the results were accurate, which the testing facility confirmed. *Id.* at \*2. See *supra* notes 36-37 and accompanying text for discussion on HTLV-III.

75. *Doyle*, 1990 U.S. Dist. LEXIS 5850, at \*2.

76. *Id.* at \*4. The district court did allow the plaintiff to amend his complaint under a theory of contributory negligence, based on the laboratory's duty to perform accurate testing, since the NIED claim had failed. *Id.* at \*5.

77. 1994 WL 675105.

78. *Griffin*, 1994 WL 675105, at \*2 (citing *Burk*, 747 F.Supp. at 287; *Wisniewski*, 759 F.2d at 274).

79. *Id.* at \*1.

80. *Id.*

81. *Id.* There was conflicting testimony that the Red Cross told the physician that Griffin was positive for HTLV I, and not HTLV III, however, the physician informed Griffin

administered by her physician which indicated that she was HIV negative.<sup>82</sup> The district court, agreeing with the American Red Cross, found that Pennsylvania did not recognize a cause of action for NIED based on a fear of AIDS.<sup>83</sup>

In *Rothschild v. Tower Air, Inc.*,<sup>84</sup> the Eastern District court found that one cannot go untested, when claiming emotional distress.<sup>85</sup> There, a passenger on a flight from Tel Aviv to New York, when reaching into the magazine pouch in front of her seat, was stabbed in the finger by a hypodermic needle located inside the magazine pouch.<sup>86</sup> HIV tests the following day proved to be negative, but thereafter she was never retested.<sup>87</sup> Her case rested on the presumption that she may have been exposed to the AIDS virus, and further testing may result in testing positive.<sup>88</sup>

The district court held that her argument was "purely speculative" and without proof that she was exposed to the AIDS virus, her suit must fail.<sup>89</sup> These "false positive" tests, which may be corrected through subsequent testing, provide only a mistaken belief that there was an exposure to the AIDS virus, rather than meeting the required "actual exposure" criteria.<sup>90</sup>

#### V. PENNSYLVANIA GRANTS RECOVERY FOR FEAR OF AIDS WHILE ADOPTING THE ACTUAL EXPOSURE RULE

It was not until 1996 that a plaintiff actually recovered under a fear of AIDS claim in Pennsylvania. In *Murphy v. Abbott Laboratories*,<sup>91</sup> the United States District Court for the Eastern District of Pennsylvania, relying upon the impact rule, allowed recovery for a registered nurse's claim of NIED despite the defendant's assertion

---

that she was HIV positive. *Id.* The result of the second test, showing that Griffin was HIV negative, was given to her within 24 hours from the time she was misinformed that she had tested positive. *Id.*

82. *Id.*

83. *Griffin*, 1994 WL 675105, at \*2.

84. No. CIV. A. 94-2656, 1995 WL 71053 (E.D. Pa. 1995).

85. *Rothschild*, 1995 WL 71053, at \*3.

86. *Id.* at \*1.

87. *Id.* at \*3.

88. *Id.*

89. *Id.*

90. *Millikan v. Holy Spirit Hospital*, 27 Pa. D&C 4th 481, 486 (Pa. Commw. Ct. 1996) (holding that recovery be limited to the medical costs necessary to determine that one was not HIV positive after being given the positive testing results of another patient).

91. 930 F.Supp. 1083 (E.D. Pa. 1996).

that Pennsylvania did not recognize a cause of action for fear of contracting AIDS.<sup>92</sup>

The nurse was pricked with a needle that was being used on a patient known to be HIV positive.<sup>93</sup> No proof was presented that the nurse had ever tested positive for HIV, nor was it alleged that she was even tested for HIV.<sup>94</sup> The needle was used to administer an antibiotic to an AIDS patient, and immediately after administering the shot, the nurse stuck her hand with the needle.<sup>95</sup> Distinguishing this "fear of AIDS" case from other cases, the district court acknowledged that here there was ample proof she had been exposed to HIV, and the needle stick was proof of a physical injury.<sup>96</sup>

More recently, the Pennsylvania Superior Court in *Shumosky v. Lutheran Welfare Services of Northeastern PA, Inc.*, dealing with facts similar to those in *Murphy*, held that "parasitic damages for fear of AIDS are available where there is a verifiable causal connection between the injury and the possible development of AIDS".<sup>97</sup>

Shumosky was a licensed practical nurse contracted through a nursing agency to provide nursing care for Lutheran Welfare Services.<sup>98</sup> Shumosky alleged that she was never informed that the patient she was treating had AIDS,<sup>99</sup> and had she been so informed, she would not have accepted the assignment.<sup>100</sup> While providing home care for the AIDS patient, she accidentally pricked her finger with a needle that had just been used to administer an injection to the patient.<sup>101</sup>

On appeal from a trial court decision holding that Pennsylvania did not recognize a cause of action based on a fear of contracting AIDS,<sup>102</sup> the superior court found that Pennsylvania recognized

---

92. *Murphy*, 930 F.Supp. at 1086.

93. *Id.* at 1084. Despite being designed, manufactured and sold to the Philadelphia hospital where Mrs. Murphy was employed, as being a "needleless system" Mrs. Murphy was stuck in her hand with the needleless needle. *Id.*

94. *Id.*

95. *Id.* at 1085.

96. *Id.* at 1087.

97. 784 A.2d 196, 201 (Pa. Super. Ct. 2001).

98. *Shumosky*, 784 A.2d at 198.

99. *Id.* at 198. The patient was a home care patient of Lutheran Welfare Services, who died a few days after the incident occurred from AIDS related complications. *Id.*

100. *Id.* at 200.

101. *Id.* at 198.

102. *Id.* at 199.

such a cause of action under the impact rule.<sup>103</sup> The court found that not only was actual exposure to HIV a prerequisite for a fear of AIDS claim, but that a scientifically-accepted channel of transmission was also required.<sup>104</sup> Although Shumosky never tested positive for HIV, nor developed AIDS,<sup>105</sup> the court found that she had adequately shown that she had been exposed to the virus, and that being pricked by a needle just used on an infected patient was a scientifically-accepted channel of transmission.<sup>106</sup>

### CONCLUSION

The Pennsylvania Supreme Court has yet to hear a "fear of AIDS" case, and there is no indication of how it would apply the actual exposure rule. It is far reaching to think that the court at this time would adopt anything other than the actual exposure rule that has been applied by the superior court to date, but it would not be unreasonable for them to limit the rule further.

Recognizing a cause of action for fear of AIDS under the impact rule has limited fear of AIDS claims to incidents where actual exposure to HIV can be linked to a physical impact or injury, such as a needle prick. In addition to actual exposure, a scientifically accepted channel of transmission must also be proven. These requirements force the claimant to become familiar with the realities of the disease by performing due diligence.

Although the eastern district court has found that one cannot go untested when claiming emotional distress,<sup>107</sup> this ruling seems to be unfounded under the current state of the law. It appears all that is required is proof of physical impact or injury, a scientifically-recognized channel of transmission, and proof of actual exposure. There is no requirement that one actually test positive to have a cognizable fear of developing AIDS.

The courts must limit fear of AIDS recovery to be more consistent with medically recognized advancements. Testing is now 95% accurate within a three-month period from the initial exposure,<sup>108</sup>

---

103. *Shumosky*, 784 A.2d at 200.

104. *Id.* at 201. The court placed reliance on the majority view accepted by other jurisdictions adhering to the actual exposure rule, requiring proof of a scientifically accepted channel of transmission be shown for one's fear of contracting AIDS be considered reasonable. *Id.* at 202.

105. *Id.* at 199.

106. *Id.* at 202.

107. *See supra* note 85 and accompanying text.

108. *See supra* note 25 and accompanying text.

whereas, until recently, the same 95% accuracy rate was accepted as accurate for a six-month period.<sup>109</sup> Since claimants are required to perform due diligence in proving a claim, the newly-published findings should persuade claimants that their fear is irrational after the three-month period, and therefore recovery should be limited to what is medically accepted.

Since the tests are only 95% accurate, one may question whether such a limitation should be applied when there is a 5% likelihood that one is infected but tests negative. Courts that have addressed this issue adhere to the theory that if one does test positive, he/she can bring a fear of AIDS suit at that point, although they may have tested positive outside of the three-month period. This seems to be the most balanced approach to allow one to claim recovery for a legitimate fear while recognizing advancements in testing.

*Andrew M. Satriano*

---

109. See *supra* note 24 and accompanying text.